

JUL 21 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States
October Term, 1987

— o —
BOB SCHWARTZ,

Petitioner,

vs.

**CITY OF GRAND PRAIRIE, TEXAS,
and
STATE OF TEXAS,**

Respondents.

— o —
**On Writ of Certiorari to the
Supreme Court of Texas**

— o —
**CITY OF GRAND PRAIRIE, TEXAS'
BRIEF IN OPPOSITION TO CERTIORARI**

— o —
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July 17, 1987

22/172

QUESTIONS RESTATED

1. Whether Petitioner Schwartz¹ failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' 19th Street Property by his failure to seek a building permit, or take any other action to develop his 19th Street property. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

2. Whether Petitioner Schwartz failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' Dalworth Street lot by his failure to appeal the first denial of his requested building permit for his Dalworth Street lot. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

3. Whether this Court has JURISDICTION to decide for the first time whether Petitioner's claims of taking have merit when the Texas state courts did not pass on these claims because they found that Petitioner failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' property. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

¹ Only the parties denoted in the caption are interested in the outcome of this proceeding.

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JURISDICTION

Respondent City of Grand Prairie does not dispute this Court's jurisdiction over *one issue* which was defensively raised by Petitioner: whether Petitioner Schwartz failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Petitioner's property by his failure to seek a building permit or take any other action to develop his 19th Street property and his failure to appeal the first denial of his requested building permit for his Dalworth Street lot. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

Respondent contends that this Court does not have jurisdiction to determine whether Petitioner's claims of taking have merit when the Texas state courts did not pass on these claims because they found that Petitioner failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' property. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

STATUTES & ORDINANCES INVOLVED

In addition to the constitutional and statutory authority cited by Petitioner, the following statute and ordinances are involved in this appeal:

1. TEX. REV. CIV. STAT. ANN. art. 1011g(g)(1) (Vernon 1963) which empowers the Board of Adjustment as follows: "To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Act or of any ordinance adopted pursuant thereto."

2. GRAND PRAIRIE, TEX., CODE art. VI, § 2-103, which states:

In addition to the authority and power of Article 1011g, Vernon's Annotated Civil Statutes and Ordinance No. 2299, as amended, the zoning board of adjustment and appeals may act as a recommending body to the city council and planning and zoning commission related to matters within their jurisdiction. (Code 1964, Amended, § 2.51(b); Ord. No. 3359, § 3, 7-6-82)

3. GRAND PRAIRIE, TEX., CODE art. VI, § 2-104, which states in relevant part:

Appeals to the board of adjustment and appeals can be taken by any person aggrieved or by any officer, department, board or division of the municipality, as provided in section 2-103, affected by any decision of the administrative officer. Such appeal shall be taken within fifteen (15) days time after the decision has been rendered by the administrative officer, by filing with the officer from whom the appeal is taken and with

the board of adjustment and appeals, a notice of appeal specifying the grounds therefor, tendering with such notice the amount in accordance with the following fee schedule to cover the cost of processing such appeal:

| | |
|--|----------|
| Initial application | \$ 35.00 |
| First review | 50.00 |
| Second review | 75.00 |
| Third review | 100.00 |
| Fourth review | 150.00 |
| Fifth review and each review thereafter | 200.00 |

The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. (Code 1964, Amended, § 2.51(c)(1))

No. 86-2067

In the
Supreme Court of the United States
October Term, 1987

BOB SCHWARTZ,

Petitioner,

vs.

CITY OF GRAND PRAIRIE, TEXAS,
and
STATE OF TEXAS,

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On Writ of Certiorari to the
Supreme Court of Texas

CITY OF GRAND PRAIRIE, TEXAS'
BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

This suit concerns two parcels of land owned by Petitioner Schwartz in Grand Prairie, Texas. They consist of

a vacant lot¹ which Mr. Schwartz, acquired in 1972 for \$7,000 (the "Dalworth lot"), and an 8 acre tract on the north side of town (the "19th Street property") which Mr. Schwartz purchased in 1978.² Both parcels of land lie in the path of proposed State Highway 161, the route of which was approved by the State in April, 1971.

On August 3, 1982, Grand Prairie passed a building ordinance restricting development within the S.H. 161 corridor. In December, 1983, Petitioner applied for a building permit *only on his Dalworth lot*. This permit application was denied in January, 1984 by a plan review analyst for the City of Grand Prairie.³ Mr. Schwartz did not seek a review of this low level decision by any administrative procedure he had at his disposal. This suit ensued, during the pendency of which the ordinance was repealed.

Grand Prairie has, since January 1, 1985, granted building permits in the S.H. 161 corridor. Petitioner Schwartz, however, has neither renewed his request for a building permit on the Dalworth lot nor made any application for a permit on the 19th Street property. Indeed, Plaintiff *never has applied for a permit on the 19th Street*

¹Mr. Schwartz bought the Dalworth lot with a house in 1972. His only act of development before he applied for a building permit in 1983 occurred when the City of Grand Prairie condemned and tore down the house on the Dalworth lot. Appendix A, Excerpt of Deposition of Mr. Schwartz on June 19, 1984 at 12, lines 3-6 (attached to City of Grand Prairie's Motion for Summary Judgment in the trial court, and part of the record on appeal).

²The City of Grand Prairie believes that Mr. Schwartz has now sold this 19th Street Property for as great as a 1200% increase over his original purchase price.

³ Petition for Certiorari at C-3.

property, either before, during or after the effective date of the ordinance.⁴

REASONS FOR DENYING THE WRIT COUNTERPOINT NO. I

THE TEXAS COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON THE GROUNDS THAT SCHWARTZ' ATTACK ON THE GRAND PRAIRIE ORDINANCES WAS PREMATURE BECAUSE HE FAILED TO OBTAIN A FINAL DETERMINATION REGARDING THE APPLICATION OF GRAND PRAIRIE'S ORDINANCES TO HIS PROPERTY RIGHTS. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

Petitioner Schwartz neither made application for a building permit nor took any other action to seek to build on his 19th Street property. His only effort to develop his Dalworth lot was to make one application for a building permit. This application was denied by a plan review analyst with the City on January 30, 1984. Schwartz did not appeal this denial to the Board of Adjustment and did not seek a variance, but instead filed this lawsuit on March 14, 1984. He claims that he was justified in not obtaining City of Grand Prairie's final determination because he "felt" that such an appeal would be "futile,"⁵

⁴ Appendix B, Affidavit of Mr. Ditta at 1-2 (attached to City of Grand Prairie's Reply Brief in the trial court, and part of the record on appeal).

⁵ Petition for Certiorari at 6.

and that this Court should accept his feelings as binding upon City of Grand Prairie.

Schwartz could have appealed to the Board of Adjustment for the City of Grand Prairie, pursuant to Grand Prairie, Texas, Code article VI, § 2-104. The Board has jurisdiction as provided in Texas Revised Civil Statutes Annotated article 1011g(g) (1) and Grand Prairie, Texas, Code article VI, § 2-103. Section 2-103 authorizes the Board to act as a recommending body to the city council and the planning and zoning commission. Schwartz, therefore, had at least two grounds for appeal to the Board: (1) that the City's plan review analyst erred in his decision to deny Schwartz' application for a building permit, and (2) that the Board should recommend to the planning and zoning commission and to the city council that Schwartz should be granted a building permit, or that the City's building moratorium ordinance should be repealed, or that he should be granted a variance.⁶ Schwartz, however, did not seek relief from the City, and instead brought this action in the Texas courts.

The United States Supreme Court recently held that a landowner whose property allegedly had been "taken" by the application of government regulations could not state a claim for compensation until or unless he had obtained a final determination of the applicability of the ordinance to

⁶ GRAND PRAIRIE, TEX., CODE art. VI, § 2-103. Petitioner argues that the Board could not grant a variance, which obviates him from his obligation to appeal and obtain a final determination of the city's ordinance's application to his Dalworth lot. This argument begs the question: if Petitioner sincerely wanted a building permit he could have appealed to the Board seeking the Board's recommendation to the City Council to grant him a permit, a variance or repeal the ordinance.

his property in *Williamson County Regional Planning Comm'n v. Hamilton Bank*.⁷ In *Williamson*, a developer argued that the county planning commission had taken his property without compensation by applying zoning ordinances and subdivision regulations retroactively to deny his request for approval of a subdivision plat.

Although the developer made numerous submittals to the zoning authorities, appealed to the higher zoning authority and had re-submitted his plat, the court held that because he had not requested variances he "had not obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property"⁸ It reasoned that because the Court

. . . consistently has indicated that among the factors of particular significance in this inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations[,] [t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.⁹

In support of its decision, the Court relied on *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*,¹⁰ a case in which it had rejected a claim that a taking had occurred, because the record did not indicate that the aggrieved parties had availed themselves of opportunities provided by law for administrative relief such as request-

⁷ 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

⁸ 105 S. Ct. at 3117.

⁹ *Id.* at 3119 (citations omitted).

¹⁰ 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

ing a variance or a waiver of the applicability of certain statutory requirements to their interests. Similarly, in *Agins v. City of Tiburon*,¹¹ the Court held that a challenge to a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property.¹² Finally, the Court relied upon *Penn Central Transp. Co. v. City of New York*,¹³ where it had declined to find that a city law affected a taking of Grand Central Terminal because the property owners had not sought approval for any plan other than one which the City's Landmarks Preservation Commission had disapproved (involving a 50-story office building above the terminal).

The Supreme Court's two recent opinions which have reached the issue of temporary takings have not altered the final determination requirement set forth in *Williamson*. In *First English Evangelical Lutheran Church v. County of Los Angeles*,¹⁴ the Court found that a California procedural device similar to a demur or Federal Rule of Civil Procedure 12(b)(6) motion presented the Court with the ripe question of temporary takings. In *Lutheran Church*, the Court specifically noted the lower courts' disposition of the question of temporary takings on the merits which permitted the Supreme Court to reach the issue.¹⁵

¹¹ 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d. 106 (1980).

¹² 447 U.S. at 260, 100 S. Ct. at 2141.

¹³ 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

¹⁴ ____ U.S. ____, 107 S. Ct. 2378, ____ L. Ed. 2d ____ (1987).

¹⁵ 107 S. Ct. at 2383-84.

The Supreme Court also reached the temporary takings question in *Nollan v. California Coastal Comm'n*,¹⁶ Although the Court did not expressly discuss the ripeness of the issue presented in *Nollan*, the Nollans sought and obtained a final determination of a taking. The Nollans sought a building permit from the Commission, and were granted one with restrictive limitations. The Nollans then sought state district court review of the Commission's decision by writ of administrative mandamus. The state court remanded the Nollans' matter to the Commission for further hearing, which resulted in the Commission's second determination that the Nollans' building permit would be subject to certain restrictions. From this final determination the Nollans again sought a writ of administrative mandamus in state court, which again held in favor of the Nollans. From this court decision the Commission appealed successfully. The Nollans then sought a writ of certiorari from the United States Supreme Court, which the Court granted. The Nollans thus had obtained the Commission's final determination twice, and all the courts discussed the takings claim which they brought.¹⁷

Both *Lutheran Church* and *Nollan* leave unaltered the requirement that a claimant seeking by inverse condemnation damages for a taking of property without just compensation obtain first a final determination from the offending governmental entity. Schwartz, however, like the developer in *Williamson*,¹⁸ has failed to obtain a final determination of the application of the City's ordinances

¹⁶ ____ U.S. ____, 107 S. Ct. 3141, ____ L. Ed. 2d ____ (1987) (WESTLAW, SCT Database).

¹⁷ See WESTLAW slip op. at 2-3.

¹⁸ 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

to his property interests. He has made no effort to obtain administrative relief by appealing to the City's Board of Adjustment to seek reconsideration of the application of the ordinance to Schwartz' Dalworth Street lot (compare *Hodel*¹⁹). He never submitted an application for a building permit on his 19th Street property (compare *Agins*²⁰). He submitted only one application for a building permit on his Dalworth lot, but never submitted alternative proposals (compare *Penn Central*²¹). Finally, Schwartz never appealed the denial of his request for a building permit (compare *MacDonald, Sommer & Frates v. Yolo County*²²). Consequently, he is asking the Court to speculate as to what the City's response would have been to an application for a building permit on the 19th Street property — if he had requested one — or to the outcome of an appeal of the denial of a permit on his Dalworth lot — if he had taken one — and to award damages based upon the City's presumed response to either of these actions. This Court should decline this invitation as it did in *Williamson* and rule that Mr. Schwartz' constitutional claims are premature.

¹⁹ 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

²⁰ 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

²¹ 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

²² ____ U.S. ____, 106 S. Ct. 2561, 2568, 91 L. Ed. 2d 285 (1986) (holding that a first-negative-response to a proposed plan of development is *not* a final determination).

COUNTERPOINT II.

THIS COURT LACKS JURISDICTION TO DETERMINE PETITIONER'S CLAIMS OF TAKINGS BECAUSE THEY WERE "*NOT PRESSED NOR PASSED UPON*" BY TEXAS STATE COURTS.

Although most of Petitioner's brief is devoted to rebutting Respondent's arguments that Petitioner did not obtain a final determination as required by this Court's holding in *Williamson*, Petitioner presents questions and arguments that urge this Court to reach the merits of his takings claims. Doing so would be improper for this Court under its "*not pressed nor passed upon*" rule.²³ This Court should refrain from exercising its resources to review and determine the merit of Petitioner's claims and should permit Texas state courts to first determine whether Mr. Schwartz' bundle of property rights has been encroached upon by City of Grand Prairie.

Although subject to this Court's discretion, this Court established and held to its jurisdictional rule or prudential restriction that it should not decide questions "*not pressed nor passed upon*"²⁴ by the state courts from which an appeal is taken. In *Illinois v. Gates*,²⁵ this Court limited its review of a case to those issues raised before and

²³ See U.S. Sup. Ct. R. 16.1(b), 28 U.S.C.A. § 2071, et seq. (1984) (stating that a ground for jurisdictional challenge is that a federal question "sought to be reviewed was . . . not expressly passed on . . .").

²⁴ *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

²⁵ *Id.*

determined by the Illinois Supreme Court, rather than to an additional issue addressed by the parties in their briefs.²⁶ The Court reviewed the cases which treated this doctrine as jurisdictional, such as *Crowell v. Randell*,²⁷ in which Justice Storey stated that “[i]f both of these requirements do not appear on the record, the appellate jurisdiction fails.” In *McGoldrick v. Compagnie Generale Transatlantique*,²⁸ the Court stated that

In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.²⁹

These reasons necessitate restraint by this Court in this case.

Schwartz presented his takings claims to the state courts of Texas which cited this Court’s opinion in *Williamson County Regional Planning Comm’n v. Hamilton Bank*,³⁰ and held that Schwartz’ claims were premature. If this Court should now limit or restrict its opinion in *Williamson* in some manner, the state courts of Texas should be permitted to review Schwartz’ claims in light of this Court’s recent opinions in *First English Evangelical*

²⁶ 462 U.S. at 217, 103 S. Ct. at 2321.

²⁷ 10 Pet. 368, 392, 9 L. Ed. 458 (1836).

²⁸ 309 U.S. 430, 434-35, 60 S. Ct. 670, 672-73, 84 L. Ed. 849 (1940).

²⁹ *Id.*

³⁰ 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

Lutheran Church v. County of Los Angeles,³¹ and *Nollan v. California Coastal Comm'n.*³² This is due to the proper deference accorded to a state court's prerogative to review the constitutional attack on its jurisdiction's law or ordinance, perhaps with an outcome based on state law and not offensive to the constitution. Further, this Court has acknowledged the general reluctance to reach and determine that legislation is violative of the constitution.³³ As in *Illinois v. Gates*,³⁴ this Court should decline to accept Petitioner's invitation to expand its review of Petitioner's claimed injuries beyond the scope of the opinion of the Court of Appeals.

In summary, this case involves a landowner who was overeager to sue the City of Grand Prairie for damages rather than to propose development plans, seek building permits, appeal the denial of them (assuming this would occur on the 19th Street property) and seek to have the ordinance revoked through the City's administrative process. In fact, shortly after Petitioner filed his lawsuit, Ordinance No. 3629 was passed which set December 31, 1984 as the expiration date for the building moratorium.³⁵ Petitioner assumed too much when he "felt it futile to appeal"³⁶ and thought the City of Grand Prairie necessarily shared his feelings. This Court should accord the City

³¹ ____ U.S. ____, 107 S. Ct. 2378, ____ L. Ed. 2d ____ (1987).

³² ____ U.S. ____, 107 S. Ct. 3141, ____ L. Ed. 2d ____ (1987) (WESTLAW, SCT Database).

³³ *Gates*, 462 U.S. at 217-18, 103 S. Ct. at 2322.

³⁴ *Id.*

³⁵ Petition for Certiorari at F-1.

³⁶ *Id.* at 6.

of Grand Prairie the dignity and protection to make its final determinations for itself.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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Q What else is in that file?

A The deed, you know.

Q Because you bought this unimproved, didn't you?

A Yes, sir — no, there was some improvements on it at the time we bought it, but there was some old houses and we red tagged them and demolished them.

Q When you say old houses, was the lot big enough to have — was there more than one rent house on there?

A There was three lots involved in it at the time. You know, on this particular lot we're speaking of it was — an associate of mine and I bought three lots, one-half undivided interest in all three lots. Then we divided up one lot each where we would have one free and clear after they were paid for. We had them on a ten year note. We paid them off, and I took Lot 14 and he took Lot 16 and we own jointly Lot 15.

Q Undivided?

A Undivided interest.

Q And the lot that is made the basis of this suit is —

A Lot 14.

Q — Lot 14, and that's the one you own free and clear?

A That's right.

Q What did you pay for that lot?

A Including interest or —

Q The cash sales price and then we'll figure it not including interest.

B-1

NO. 84-3406-B

BOB SCHWARTZ,

Plaintiff,

vs.

CITY OF GRAND PRAIRIE,
TEXAS, AND THE STATE
OF TEXAS,

Defendants.

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
44TH JUDICIAL DISTRICT

EXHIBIT "E"

AFFIDAVIT OF VINCE DITTA

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared VINCE DITTA, who, after being by me duly sworn, stated:

1. I am Vince Ditta, Chief Building Official of the Building Inspecting Department of the City of Grand Prairie, Texas. I am over twenty-one (21) years old, of sound mind and am competent to make this Affidavit. I have personal knowledge of each of the facts contained in this Affidavit.

2. The City of Grand Prairie, Texas never received an application for a building permit on Lots 1 through 6, Block 1, County Wood Addition, an addition to the City of Grand Prairie, Dallas County, Texas ("19th Street land") from Mr. Bob Schwartz, or anyone else, during the building moratorium on the S.H. 161 corridor (August 3, 1982 through December 31, 1984). The City of Grand

B-2

Prairie never denied Mr. Bob Schwartz a building permit on the 19th Street land.

3. Since January 1, 1985 the City of Grand Prairie's policy has been to grant otherwise proper building permit requests without regard to the subject property's location in the S.H. 161 corridor. The City has, in fact, granted several building permits on land in the S.H. 161 corridor.

4. I know of no reason why upon properly applying for a building permit in compliance with applicable laws, ordinances and regulations, Mr. Bob Schwartz would not be granted one. It certainly would not be denied merely because it was in the S.H. 161 corridor. Mr. Bob Schwartz has not applied for a building permit even after January 1, 1985 on either his 19th Street land or his Dalworth Street lot (Lot 14, Block 143, Dalworth Park Addition, otherwise identified as 1234 Dalworth Street, Grand Prairie, Texas).

FURTHER AFFIANT SAITH NOT.

/s/ VINCE DITTA

VINCE DITTA

SUBSCRIBED AND SWORN TO BEFORE ME this 28th day of February, 1985.

/s/ TERRY L. CROWDER

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:

6-7-88